DOUGLAS J. LUCKERMAN
Attorney at Law

20 Outlook Drive
Lexington, MA. 02421
(781) 861-6535
DLuckermanlaw@aol.com

October 23, 2000

Mr. Jeff Keohane
US EPA, OGC, MC2322A
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: MICSA Documents

Jeff, Sorry about the delay in getting you these documents.

Here is an index of what is attached and why:

1. January 20, 1978. Memo from Robert Lipshurtz to President Carter, regarding a summary of the recent MOU reached between MaineTribes and the White House on the resolution of the Maine Indian land claims.

2. February 6, 1978. Complete version of MOU released to public Page 3, Item 5 of MOU, shows intent of Tribes was not to provide State with unilateral jurisdiction, but only such jurisdiction as was then provided under 25 USC 1321 and 1322. Did not include regulatory jurisdiction.

3. April, 14, 1978. Remarks of Eliot Cutler on White House role in settlement of Maine Indian land claims dispute. Please note at page 5, that even back then the State refused to negotiate with Tribe. Considering State's current stance, what chance do Tribes have to be heard, or for fair treatment on environmental matters in future? The Tribes view this as a critical Trust responsibly issue for EPA.

4. March 27, 1978. Letter to Maine Attorney General Joseph Brennan from Leo Krultitz and Elliot Cutler regarding clarification of MOU. Krulitz and Culter negotiated the MOU with the Tribes. They were clear about the Tribes intent and understanding of the agreement that State jurisdiction was not intended to apply to any regulatory authority. See Page 3 Integrity of State Laws. See also page 7 where Krulitz and Cutler state that land acquired by tribes will become "federal reservation land." Attached to this letter is the original letter from Brennan dated March 2, 1978. Significantly, in his letter to the White House, Brennan's concern over the "Integrity of State Laws" puts the current State situation on its head. Brennan appears to be concerned that Tribal lands would leave fish and wildlife, other Maine citizens and abutters, vulnerable to problems caused by the Tribes such as "stream siltation, air pollution,

clearcutting, noise, and unfair business practices. A bit ironic considering the current plight of the Tribes vis a vis Maine's environmetnal actions since 1980.

5. November, 21, 1978. Letter from Leo M. Krulitz, Dept. Of Interior Solicitor, to Tom Tureen regarding terms for a complete settlement of clams the White House would support. Letter acknowledges that while the State insists that all laws of State apply to trust lands newly acquired by the Tribes, this position is "inconsistent" with the MOU

6. June 7, 1979, Transmittal letter from Larry Hammond, Deputy Assistant Attorney General, to Douglas Huron Senior Associate White House Counsel, regarding a letter from Attorney General Bell to Cecil Andrus dealing with the federal government's Indian trust responsibility. Bell's letter states that where a statute, treaty, or Executive Order manifests a purpose to benefit all Indians or a tribes, it is the obligation of the responsible Executive Branch officials to give full effect to that purpose. Bell also states DOJ's position that in construing laws dealing with Indians, such laws must be interpreted "in light of the special relationship and special responsibilities of the government towards the Indians" page 4. This supports the Maliseet and Micmac contention that EPA must abide by the promise made by Congress to the Maine Tribes that they will be protected from acculturation. Moreover, the fact that Congress placed land and money in permanent trust for the Tribes, that the Tribes were provided federal recognition of their aboriginal place in the history of this county and that all Maine Tribes, including Maliseet and Micmac, were provided governments to protect the "general welfare" of their people from acculturation, dramatically manifests the intent of Congress to protect and preserve the Tribes cultural identity, even if that means in specific cases, denying the State jurisdiction over Tribal land and waters. EPA cannot both delegate and protect the Tribes in Maine at this time.

7. June 9, 1980. Memo from Doug Huron to Lloyd Cutler, White House Counsel, with an analysis of the State of Maine Indian legislation impact on the Houlton Band of Maliseet Indians. This analysis supports the Maliseet's position that "while the state act does not recognize any power or authority of the Band the Federal act "does not specifically revoke concomitant tribal power." Furthermore the memo confirms the purpose of federal recognition, at that time, was to establish the Maliseet "...entitlement to a government to government relationship with the U.S." While these are not legally binding opinions, it clearly illuminates and supports the Maliseet argument that their inherent sovereignty and jurisdiction was not removed by the 1980 Act. Without question, the White House negotiators had the same understanding of the Maliseet's jurisdiction at the time this memo was written, which was AFTER the passage of the State Implementing Act. Keeping in mind that any ambiguity in the Act should be interpreted to benefit the Tribe, the EPA at a minimum, cannot delegate NPDES authority over Maliseet or Micmac lands without providing these Tribes with a veto over state issued permits, or the ability include such additional criteria that they deem necessary.

8. June 30, 1980. Note from Doug Huron to Lloyd Cutler forwarding Testimony that Cecil Andrus, Secretary of the Interior would be presenting to Congress on the federal Maine Indian Lands Claims Settlement Act. Andrus testified that the federal contribution of 81.5 million dollars is supported by the Carter Administration "because the settlement is based on the

agreement of all relevant parties in Maine and should therefore provide a lasting solution to this problem." This supports the Micmac and Maliseet argument that for EPA to delegate the NPDES program prior to the State and the Tribes entering into an agreement on jurisdiction, would violate the basic structure and intent of the agreement the Act is based on.

While 1725(a) grants the state some concurrent authority over the Maliseet, it does not provide the State with the unilateral authority to adversely impact the Tribes traditions and culture. All of the Maine Tribes understood the Act to protect their right to survive and prosper into perpetuity. Delegation of NPDES to the State, in light of the State's position that the Tribes no longer exist as Tribes and that it shall only treat tribes as it treats other Maine residents, would be a direct and egregious violation of the intent of the Tribes and the federal government at the time of the signing of the Act.
The same argument can be made for the Micmac. Absent and an agreement on jurisdiction, the State cannot impose its will on the Tribes. That concept would have been unthinkable to either the Carter administration or the Tribes and would never have been agreed to. The unmistakable premise of both the 1980 and 1991 Acts is that an agreement on jurisdiction, previously arrived at, was then accepted by Congress. To interpret the Acts otherwise is to tell the Tribes their cultural survival depends solely on the whim of a State that has no interest in seeing them survive as Tribes.

9. February 6, 1979. Memo to File from Doug Huron regarding a conversation with Tom Tureen. Memo notes that Tom Tureen has not spoken to the former Attorney General, now Governor of Maine Brennan, since November 1978, and that the new Maine Attorney General, Richard Cohen, says he will take the initiative to set up talks to resolve the jurisdiction issues.

10. March 18, 1997. Minutes of a meeting of the Maine Indian Tribal-State Commission. Richard Cohen, Chairman of the Maine Indian Tribal-State Commission (also former State Attorney General who represented Maine in 1980 jurisdiction discussions), in response to recommendations of the 1996 Maine Task force on Tribal-state relations states that the "settlement Act was intended to be a living document". Furthermore, he adds that "there is a segment in state government that says if its not in the settlement it cannot be" and "this is not what was expected" See pages 3 and 6. This supports Maliseet argument that Settlement Act was not supposed to be the end, but the beginning, of negotiations between the State and the Tribe over jurisdiction. However. Once the Act was passed, the State reneged on its commitment to negotiate the jurisdictional contours and reverted to its original position that the Maliseet have no jurisdiction in Maine.

11. June 9, 1997. Letter to Governor Angus King from Richard Cohen, Chairman of the Maine Indian Tribal-State Commission, stating that the Commission has been a failure at resolving tribal state issues because the state has failed to acknowledge the authority of the Commission. Chairman Cohen, requests that the Governor require state agencies to notify the Commission prior to taking any action that will affect tribes, the Governor ultimately refuses to do so.

12. July 1997. In an interview with the Maine publication "Working Waterfront" on the extent of the 1980 Settlement Act, the Maine Indian Tribal-State Chairman Richard Cohen states that "there is a divided opinion within the attorney general office among people who were not involved in those negotiations." There seems to be a belief that that the Indian Lands Claims Settlement Act was signed and that its carved in stone. There has to be some disabusing of that. There were many issues, including fishing rights, that were subject to discussion and further legislation at that time."

    Here is the man who negotiated the 1980 Settlement Act for the State of Maine and he clearly does not agree with the State's current interpretation of the Act-that all jurisdictional issues were resolved by the Act, end of story. Chairman Cohen's statements significantly bolster the Maliseet argument that the 1980 Settlement Act was not the end, but the beginning of negotiations between the State and the Maliseet regarding jurisdiction. Chairman Cohen passed away in the late 1990's so his position is only available to us through his recorded words.

13. September, 12, 1995 and September 25, 1996. Minutes of the Maine Indian Tribal-State Commission. On these two dates the Commission discussed the conflict of interest of one its its members, Matt Manahan of the law firm Pierce Atwood of Portland, Maine. Mr. Manahan refused to recuse himself on issues that may be precendential and of a benefit to his clients, who are clearly adversarial in interest to the Tribes on many issues. When Mr Manahan refused, he indicated that it was unnecessary as Governor King has not asked him to step down. See pages 3 and 9.

14. Latest Fish Advisory issued by the State of Maine. Shows the Maliseet's traditional river, the Meduxnekeag, so contaminated that the Tribe is limited **to two fish meals a month**!

15. Bullet Points for our Conference Call with Carol Browner. This will explain the significance of documents 13 and 14.

Please call me with any questions.

Sincerely,

Douglas J Luckerman, Esq.

ADMINISTRATIVELY CONFIDENTIAL

THE WHITE HOUSE

WASHINGTON

January 20, 1978

MEMORANDUM FOR THE PRESIDENT

FROM: Robert J. Lipshutz RJL

SUBJECT: Maine -- Indian Land Claims

With reference to this matter, you will recall that subsequent to Bill Gunter's recommendation to you I suggested that you withhold making a final determination of your recommendation to the Congress until we could discuss the matter with all of the various interested parties in an attempt to arrive at a consensus which was consistent with Bill Gunter's proposal.

During this period of time I personally have had numerous discussions with members of the Congressional Delegation from Maine, the Governor of Maine, the leaders of both Houses of the State Legislature, representatives of the Indian tribes, and others.

During the past few weeks, a three-person task force has been discussing details of proposals and counter proposals with the Indian tribes and their representatives, in an attempt to reach a consensus which was as close as possible to the Gunter recommendation and also in a form which the Maine political leadership (and particularly the Congressional Delegation) might concur. This three-person task force acting on our behalf consisted of Steve Clay (Bill Gunter's law partner), Leo Krulitz (Legal Counsel for the Department of Interior), and Eliot Cutler (representing OMB).

As a result of these numerous discussions we have arrived at a proposed "joint memorandum of understanding" between the Indian tribes and the Executive Office, which I am attaching, and which I recommend that you approve. I then will attempt to get the approval of the Maine Delegation, through the leadership of Senator Muskie, after which I would propose that we support the necessary legislative effort to implement this agreement.

In the first paragraph of this memorandum you will note the four alternative methods of settling this dispute. In essence,

the Federal government will have the option to consummate the agreement under any one of these four alternatives, the specific alternative to be exercised depending upon the decision of the large private landholders, on the one hand, and the State of Maine, on the other hand.

There are three categories of landholders in Maine: (1) small private landholders, (2) large private landholders (defined as those holding more than 100,000 acres of land), and (3) the State of Maine itself, which holds about 500,000 acres. Under the terms of this proposal, the minimum Federal obligation would be: (1) to extinguish the Indians' claim for up to 100,000 acres held by each landholder, thereby clearing title completely of all the land of the "small property owners" as well as 100,000 acres each of the land of the "large property owners"; (2) to appropriate $25,000,000 to compensate the Indians for extinguishing these claims. It is my understanding that there are approximately seven companies (as well as the State) who own more than 100,000 acres of land each; these are the "large property owners".

The Federal dollar obligation then could increase to a maximum of $30,000,000 if the large private landholders agree to settle. The Federal government would have to be able to acquire this 300,000 acres of land from the "large property owners" at an average price of only $16.66 per acre -- which is considerably less than the current fair market value of such land.

With reference to the State of Maine, which owns approximately 500,000 acres of land to which the title is in question as a result of these claims, the State would have the option either of:

1. Continuing to litigate over this matter, as the State Attorney General and Governor have indicated they would do; or

2. Settling this claim against the land for the sum of $15 million.

With reference to the State of Maine and the Indian tribes, up until this time the State has expended a considerable sum each year for the benefit of the tribes, primarily because the tribes have not heretofore been "formally recognized as tribes" entitled to Federal benefits. That now has been changed, and it is quite likely that the annual expenditure by the State of Maine would be eliminated or substantially reduced. Nevertheless, the State still would find it difficult, both financially and politically, to pay out a sum

as large as $15 million at one time to settle this matter. Therefore, this seems to be the most difficult aspect of the dispute to settle, but we still believe this is the best approach at present. As contrasted with the pendency of law suits against private landowners, there is little, if any, economic dislocation created by an ongoing law suit involving only the publicly held land of the State of Maine.

Bill Gunter and I both recommend that you approve proceeding in this matter.

_____Approve

_____Disapprove

_____Other

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

JAN 10 1978

Joint Memorandum of Understanding between:

- Passamaquoddy/Penobscot Negotiation Committee
- Eliot Cutler, Leo Krulitz, Steven Clay--White House Work Group on Indian Claims in Maine

We agree as follows:

Items 1 and 2

The Nations agree to accept any one of the four following settlement alternatives: (1) settlement of claims against small landholders, litigation for possession and trespass damages against all others; (2) settlement of claims against all private landholders, litigation against the State of Maine; (3) settlement of claims against small landholders and the State of Maine, litigation against large landholders; (4) settlement of all claims. Amounts of land and money for the alternatives are as follows:

Alternatives	Land	Money
1	-0-	$25,000,000
2	300,000 acres plus options to purchase 200,000 acres	$28,500,000
3	-0-	$40,000,000
4	300,000 acres plus options to purchase 200,000 acres	$43,500,000

(a) The Federal Government reserves the right to select any of the above alternatives. The Federal Government will consult with the Tribes in advance before final selection of an alternative.

(b) The amount of land and money to be obtained under the various alternatives from the various parties shall be determined by the Federal Government. In no event shall the total amounts under each alternative be less than as specified above.

(c) The land selection process will be established with the consent of the Nations and the Federal Government. All lands acquired in a settlement shall be held in Trust for the benefit of the Nations by the Federal Government.

(d) The funds shall be paid in Trust for the benefit of the Nations on terms agreeable to them and the Federal Government. No part of the capital will be distributed on a per capita basis. The terms of the Trust shall not preclude reasonable investment of the principal nor effect in any way the right of the Nations to dispose of income. The right to dispose of income shall be wholly a matter for tribal discretion.

(e) The 300,000 acres of land to be obtained under alternatives 2 and 4 shall be average quality woodland which has a current market value of about $112.50 per acre.

(f) The options for the purchase of 200,000 acres of land will be exercisable by the Tribes at market value at the time exercised. Tribal funds will be used to exercise the options.

(g) To facilitate acquisition of the land specified in (e), the Federal Government will offer to purchase such 300,000 acres up to a total cost of $5,000,000.

(h) Land and money provided by this settlement shall be divided equally between the two Nations.

Items 3 and 4

The Federal Government pledges that the Nations will be considered fully federally recognized tribes and will receive all federal services, benefits and entitlements on the same basis as other federally recognized tribes. If option 3 or 4 is implemented, the State of Maine will not be expected to provide any special Indian services to the Tribes.

Item 5

If land is acquired pursuant to alternatives 2 and 4, such land and lands currently held by the Tribes shall be treated for governmental purposes as other federally recognized tribal lands are treated. The consent of the United States shall be given for the State of Maine to exercise jurisdiction over criminal offenses and civil causes of action with regard to such lands pursuant to 25 USC 1321, 1322. Provided, however, that the United States shall have the right to effect a retrocession of such criminal and civil jurisdiction upon request of the Tribes within two years.

Items 6 and 7

If either alternative 2 or 4 is implemented, in addition to acquiring the land specified, the Federal Government shall use its best effort to acquire easements for hunting, fishing, trapping, fowling, and gathering for non-commercial purposes and the right to obtain brown and yellow ash from the large landowners within the claim area defined with certainty in the last litigation report on file with Justice from the Department of the Interior which easements shall in no way interfere with the property owners' right to use such lands for any purpose. If such efforts are unsuccessful, the Tribes shall have the right to reject such alternative.

Item 8

We will further discuss the problem of flooding by Bangor Hydro-Electric.

Item 9

The Federal Government will vigorously pursue a final solution on the terms specified in this memorandum of understanding. A letter from the President will be provided promising to vigorously oppose any Congressional effort to extinguish the Tribes claims without Tribal consent on terms other than provided herein.

Item 10

We are agreed that it would be preferable if the private non-Indian landholders within Indian Township could be convinced to voluntarily sell their claims to lands within that township, and that we will make a good faith effort to obtain such consent.

Item 11

The settlement will take a form which will effectuate the terms of this agreement and preclude further litigation as indicated.

Item 12

The Work Group will have 60 days after the initialling of this Memorandum of Understanding in which to reach an agreement in principle with the state of Maine and large land owners.

FOR IMMEDIATE RELEASE FEBRUARY 10, 1978

Office of the White House Press Secretary

THE WHITE HOUSE

JOINT MEMORANDUM OF UNDERSTANDING

For several months, representatives of the Passamaquoddy and Penobscot Tribes and a White House Work Group comprised of Eliot R. Cutler, Associate Director, Office of Management and Budget; Leo M. Krulitz, Interior Department Solicitor; and A. Stephens Clay, Washington attorney, have been meeting to discuss the tribes' land and damage claims in Maine and the federal services to be extended to the tribes in the future. These discussions have produced agreement with respect to both a partial settlement of the claims and future federal services. The parties hope that the terms and conditions described here also will serve as a vehicle for settlement of all the tribes' claims.

A. The Basic Agreement: A Partial Settlement

The Administration, through the White House Work Group, agrees to submit to the Congress and to seek passage of legislation which would provide the two tribes with the sum of $25 million in exchange for (1) the extinguishment of the tribes' claims to 50,000 acres per titleholder of such land within the 5 million-acre revised claims area (Area I)[1/] to which title is held as of this date by any private individual(s), corporation(s), business(es) or other entity(ies), or by any county or municipality;[2/] and (2) for the extinguishment of all their claims in the

---

1/ This acreage description of the revised claims area is based on information taken from maps and not from surveys. The final revised claims area, to be determined by the Department of Justice based on information furnished by the Department of the Interior, may vary from this description by ± 5%.

2/ For purposes of such extinguishment, titleholding, whether direct or indirect, partial or complete, is deemed to include control, or ability to control, through subsidiaries, partnerships, trusts, or other entities.

7.5 million additional acres (Area II) in the claims area as originally defined (Areas I and II). Thus, every landholder within Area I would have his title cleared of all Passamaquoddy and Penobscot land and damage claims up to 50,000 acres,[3/] and all titles in Area II would be totally cleared of such claims.

The tribes will execute a valid release and will dismiss all their claims with respect to Area II and with respect to landholders with 50,000 acres or less in Area I. The legislation will not clear title with respect to any of the holdings of any private individual, corporation, business, or other entity which are in excess of 50,000 acres in Area I, nor to any lands in Area I held by the State of Maine.

By preliminary estimate, the $25 million to be paid by the federal government would clear title to approximately 9.2 million acres within the original 12.5 million-acre claims area. All claims against householders, small businesses, counties and municipalities would be cleared. Approximately 3.3 million acres in Area I out of the original 12.5 million-acre claim would remain in dispute. About 350,000 acres of the disputed land is held by the state; the remaining 3.0 million acres is held by approximately 14 large landholders.

B. Proposed Settlement of the Tribes' Remaining Claims Against the State of Maine and Certain Large Landholders

The tribes and the White House Work Group recognize the desirability of settling the tribes' entire claim, if possible. However, direct discussions between the tribes and the State of Maine or between the tribes and the large landholders either have not occurred or have not been successful.

3/ For any landholder with holdings in excess of 50,000 acres, the 50,000-acre exemption would apply to lands which are representative of the overall holdings of such landholder.

In an effort to promote an overall settlement, the White House Work Group has obtained from the tribes the terms and conditions on which the tribes would be willing to resolve their claims against the State of Maine and against the large landholders whose titles would not fully be cleared by the Basic Agreement. The tribes have authorized the Work Group to communicate these terms and conditions to the appropriate representatives of the State and the affected landholders. In this context, the Work Group serves primarily as an intermediary with limited authority to settle the remaining claims on the terms set forth by the tribes.

1. Claims Against the State of Maine

The tribes have claims against the State of Maine for approximately 350,000 acres of State-held lands in Area I and for trespass damages. Rulings on several of the defenses originally available to Maine already have been made by the courts in the tribes' favor.

The State of Maine currently appropriates approximately $1.7 million annually for services for the Penobscot and Passamaquoddy Tribes. The tribes are willing to dismiss and release all their claims for land and damages against Maine in exchange for an assurance that Maine will continue these appropriations at the current level of $1.7 million annually for the next 15 years. The appropriations would be otherwise unconditional and would be paid to the United States Department of the Interior as trustee for the tribes. Should the State agree to give this assurance, the legislation to be submitted to the Congress by the Administration

would provide for the extinguishment of all tribal claims to the affected State-held lands and all trespass damage claims when the last payment is made.

2. Claims Against Large Private Landholders

In exchange for the dismissal, release and extinguishment of their claims to approximately 3.0 million acres within Area I held by the large landholders as described in the Basic Agreement, and in exchange for a dismissal and release of all trespass claims against said individuals or businesses, the tribes ask that 300,000 acres of average quality (approximately $112.50 per acre) timber land be conveyed to the Department of the Interior as trustee for the tribes, and that they be granted long-term options to purchase an additional 200,000 acres of land at the fair market value prevailing whenever the options are exercised. The tribes also ask for an additional $3.5 million to help finance their exercise of these options.

In recognition of the desirability of achieving an overall settlement, the Administration will recommend to the Congress the payment by the federal government of an additional $3.5 million for the tribes, if the affected private landholders will contribute the 300,000 acres and the options on 200,000 acres as set forth in the tribes' settlement conditions. Additionally, the Administration will recommend the payment of $1.5 million directly to the landholders contributing acreage and options to the settlement package. The $1.5 million would

be divided proportionately according to the contribution made by the respective landholders.

If a settlement of the tribes' claims against the large landholders can be accomplished on the terms specified above, the Work Group has agreed to use its best efforts to acquire easements permitting members of the tribe to hunt, fish, trap and gather for non-commercial purposes and to obtain brown and yellow ash on all property from the large landholders within Area I. The tribes will be subject to applicable laws and regulations in the exercise of these easement rights. Additionally, it is agreed that the exercise of easement rights shall in no way interfere with the landholder's use of his property, either now or in the future. If the Work Group's efforts to acquire these easements are unsuccessful, the tribes have reserved the right to reject a settlement with the large landholders.

C. Other Terms and Conditions

(1) Nothing in this agreement is intended by the parties to be an admission with respect to the value of these claims. If settlement can be accomplished, it will reflect a compromise from every perspective. The tribes regard their claims as worth many times more than any consideration to be received under this agreement. The State of Maine, on the other hand, has taken the position that the tribes' claims are without merit.

The Administration has chosen to evaluate the claims not merely on the basis of their merit and their dollar value, but also in light of

the facts that the claims are complex; they will require many, many years to resolve; and the litigation will be extremely expensive and burdensome to everyone and could, by its mere pendency, have a substantial adverse effect on the economy of the State of Maine and on the marketability of property titles in the State.

With these considerations in mind, any settlement will reflect a shared understanding of the reality created by the litigation, rather than one party's view of the equity of the claims. The claims are unique, and resolution of them on any basis other than litigation similarly must be unique.

(2) If a settlement can be reached with the State of Maine, with the large landholders, or with both on the terms described above, the White House Work Group has the option of implementing a settlement on those terms, rather than on the terms of the Basic Agreement specified in Section A. The Work Group has agreed to consult with the tribes before choosing any of the alternatives provided by this agreement.

(3) The tribes recognize that in no event shall the federal government's cash contribution to any settlement exceed $30 million; the federal government will pay $25 million to achieve the Basic Agreement, and an additional $5 million to facilitate a settlement of all claims against private landholders.

(4) The location of the 300,000 acres must be satisfactory to the tribes. However, it is agreed that the 300,000 acres may be in several tracts, so long as the timber land is of average quality. It is also agreed that land will be selected in such a manner as to not unreasonably interfere with the large landholders' existing operations.

(5) The cash funds to be obtained in the settlement shall be paid in trust for the benefit of the tribes on terms agreeable to them and the federal government. No part of the capital will be distributed on a per capita basis. The terms of the trust shall not preclude reasonable investment of the principal, nor shall they affect in any way the right of the tribes to dispose of income. The right to dispose of income shall be wholly a matter for tribal discretion.

(6) All property and cash obtained pursuant to this settlement shall be divided equally between the two tribes.

(7) The federal government pledges that the tribes will be considered fully federally recognized tribes and will receive all federal services, benefits and entitlements on the same basis as other federally recognized tribes.

(8) All lands acquired by the tribes and land currently held by the tribes shall be treated for governmental purposes as other federally recognized tribal lands are treated. The consent of the United States will be given to the exercise of criminal and civil jurisdiction by the State of Maine pursuant to 25 USC 1321, 1322, provided that the United States may effect a retrocession within two years upon request of the tribes.

(9) If a settlement can be reached with the State of Maine, the White House Work Group will use its best efforts to obtain for the tribes assured access under mutually agreeable regulations to a designated place

in Baxter State Park for religious ceremonial purposes. If the Work Group's efforts to obtain such assured access are unsuccessful, the tribes have reserved the right to reject a settlement with the State of Maine.

(10) With respect to settlement of the tribes' claims against the State of Maine and large landholders within Area I, the White House Work Group has 60 days to accomplish an agreement. If such a settlement cannot be accomplished within that period, the parties will proceed with the Basic Agreement outlined in Section A, above.

(11) The settlement agreement will be executed in a form appropriate to effectuation of the terms of the agreement and will preclude further litigation with respect to all claims settled. Suitable procedural safeguards will be adopted and implemented by court order in the pending litigation to assure that the parties' intent with respect to this settlement agreement is accomplished.

(12) The White House Work Group and this Administration pledge their vigorous support to settlement on the terms and conditions specified in this memorandum.

(13) This agreement is subject to ratification by the tribes on or by February Ninth, Nineteen Hundred and Seventy Eight.

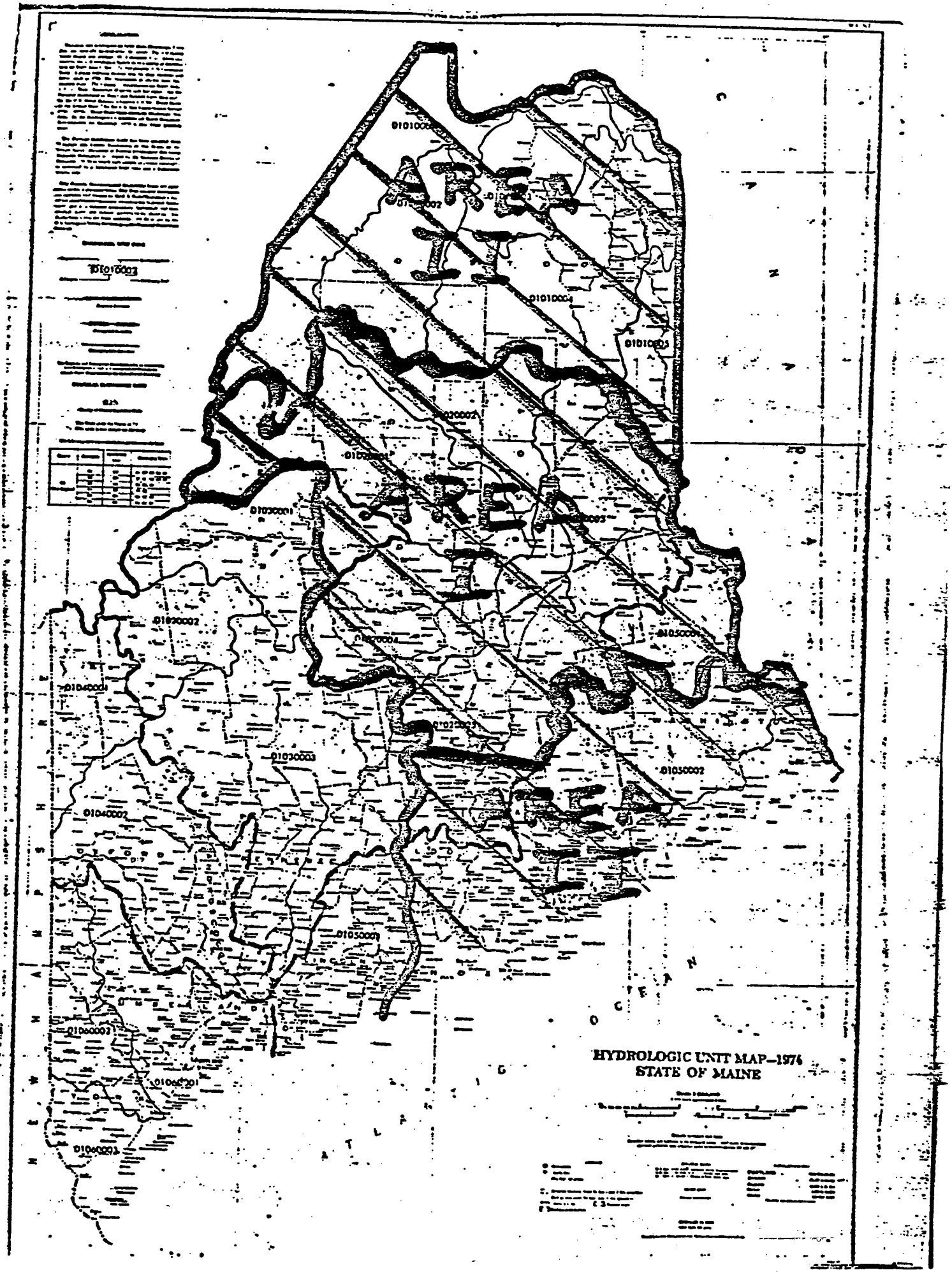
FOR THE ADMINISTRATION:

FOR THE TRIBES:

Eliot R. Cutler

Leo M. Krulitz

A. Stephens Clay



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MAR 27 1978

Honorable Joseph E. Brennan
Attorney General
State Capitol Building
Augusta, ME 04333

Dear Mr. Brennan:

We have your letter of March 2. Our responses to the questions which you have raised are as follows:

1. Past State Payments

You have asked whether the White House Work Group, in formulating its recommendations in this matter, has taken into consideration past payments by Maine to the tribes in question. As you have represented to us, those payments total 15 million dollars over the past 15 years. Assuming a combined tribal population of 1,500 over that period, Maine has thus paid out approximately $666.67 per Indian in services, housing and other support annually during that 15-year period.

As far as we can determine, the monies paid out by the State of Maine to these two tribes in the past were largely the result of Maine's voluntary assumption of duties and obligations owed by the Commonwealth of Massachusetts to the tribes. As both the District Court and the First Circuit recognized in the Joint Tribal Council v. Morton litigation, voluntary assistance rendered by a state to an Indian tribe is not determinative of or necessarily related to the definition of federal responsibilities to that same tribe. Accordingly, even if the federal government properly could be found to have had an obligation to these tribes throughout the past 200 years, the existence of that hypothesized obligation would not necessarily negate or condition the obligations to the tribes voluntarily assumed by Maine under the Articles of Separation between Maine and Massachusetts or otherwise.

Perhaps you mean to argue that if the transactions wherein the tribes originally lost their land are void, then Maine's obligations to the tribes are not supported by consideration, and that consequently Maine should be "reimbursed" for any payments it has made relying on the assumption that the land transfers were valid. The argument assumes the interdependency of Maine's obligations to the tribes and the validity of the land transfers. The assumption may or may not be valid. Further, because such an argument presupposes a 200-year violation of the Nonintercourse Act, it concedes that the tribes have been wrongly denied possession of their lands during that entire 200-year period. If so, they now appear entitled to damages as well as possession. Those damages would appear likely to exceed the total payments voluntarily made by the state over the past 15 years by a substantial amount.

We know of no authority for your contention that the federal government "has been obligated to provide support services for many years past because of the trust relationship it now asserts to exist". That "trust relationship" exists now because Judge Gignoux and the First Circuit have found it to exist. Both courts have clearly limited the Federal Government's trust responsibilities under the Nonintercourse Act to land transactions "which are or may be covered by the Act". While it is true that the Interior Department subsequently determined independently that the tribes were entitled to federal recognition and therefore to a degree of federal financial support, that decision in no way relieved the State of Maine of any obligation it independently had assumed to the tribes. Moreover, the United States had no obligation to provide any monies to these tribes until the Department of Interior had determined their eligibility for such payments.

Finally, we would reiterate that the terms of settlement have been proposed to the State of Maine by the tribes. In our discussions with the tribal representatives, the Work Group did urge that the tribes take into consideration Maine's past payments to the tribes. It is our understanding that the tribes did give the payments the consideration requested.

2. Integrity of State Laws

We already have advised you that the term 'retrocession' as used in paragraph (8) on page 7 of the Joint Memorandum is a misnomer. Nevertheless, if the State of Maine initially exercises civil and criminal jurisdiction over the acquired Indian lands pursuant to 25 U.S.C. § 1321-22, this will only establish their authority to exercise judicial jurisdiction over that territory. In Bryan v. Itasca County, 426 U.S. 373 (1976), the Supreme Court held that that statute, and its predecessor, P.L. 280, did not give the States any regulatory or taxing authority over Indian reservation lands.

In this instance the Joint Memorandum does not state whether the acquired lands will constitute an Indian reservation. Not all Indian lands do. The Memorandum states only that the acquired lands and current tribal lands "shall be treated for governmental purposes as other federally recognized tribal lands are treated." Off-reservation tribal lands are often treated very differently from reservation tribal lands, depending on the situation. We assume that the Tribes would want all their lands treated as Indian reservations, but we assume that further discussions could be undertaken concerning this question.

Indians on the tribal lands generally would not be subject to state laws; non-Indians may or may not be, depending on the attempted exercise of state authority. For example, non-Indian retail businesses would have to be federally licensed, and the State would exercise no authority over them because of federal preemption. Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965). However, this lack of state authority does not result in a jurisdictional void, or even necessary deference to tribal authority. The federal government would exercise authority over matters of consumer protection (e.g., Indian trader laws, Truth-In-Lending Act, Fair Credit Reporting), environmental protection, minimum wage laws, and fish and game laws. The general rule is that federal laws of general application apply to Indians unless they state otherwise. FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

3. Tax Losses

Because the acquired lands would be held in trust by the Secretary of the Interior for the benefit of the Tribes, the realty would not be subject to state taxation. If the lands are considered an Indian reservation, the personal property of Indians would also be exempt from state taxes. Non-Indians would not be similarly entitled to that exemption. If the lands are in reservation status, the income of Indians who live and work on the reservation would be exempt from state (not federal) tax. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). Non-Indian income would be taxable. The State would not be able to impose sales taxes on Indian purchasers or gross receipts taxes on Indian vendors to collect sales taxes assessed against non-Indian purchasers. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976)

4. Easement Uses and Fish and Game Laws

We do not know the exact intensity of the contemplated use of the easements requested by the tribes. However, as the Joint Memorandum states at p. 5, "(t)he tribes will be subject to applicable laws and regulations in the exercise of these easement rights." As we explained to you at our February 9 meeting, this sentence refers to state laws and regulations.

5. Other Indians in Maine

Previously it has been reported that the two tribes might assert claims to our 12 million acres. In fact, the tribes claim approximately 10 million acres. With respect to that land, title will be cleared completely. All claims by these two tribes to Maine land will be extinguished.

If any other tribes have claims to any part of the 10 million acres now claimed by the Passamaquoddies and Penobscots, the defense of those claims and the responsibility for any settlement or liability arising from those claims must be assumed by the Passamaquoddys and the Penobscots. The Administration's bill will create a fund out of which all tribal claims to any part of the acres claimed by the tribes and cleared must be satisfied. Based on the information submitted to us to date, the Penobscots and Passamaquoddys are the only tribes entitled to participate

in that fund. No other claims of substance in Maine have been made or brought to our attention.

The settlement proposed with respect to the Maine claims does not have particular precedential value with respect to any other claims. Each case is unique. In most other cases, there will be no need for any involvement by the Administration.

6. Changes from the Gunter Plan

Complex litigation involving many parties and substantial damage claims can be difficult to compromise. With respect to such cases, many different proposals rationally may be characterized as "fair" or "equitable". Judge Gunter's original proposal, which could have cost the State of Maine more than twice as much as the Task Force's recommendations, appeared "fair and equitable"; however, the Administration also consideres the revised terms of the Basic Agreement to be "fair and equitable".

The critical distinguishing aspect of the Task Force's recommendation is that the settlement between the federal government and the tribes described in the "Basic Agreement" has been arrived at by a process of arms-length, good-faith bargaining, rather than by governmental dictate. The plain and simple fact is that any effort to implement a dictated rather than a bargained settlement would be legally challenged by the tribes. As long as that legal challenge were unresolved, homeowners and other small property owners in Maine would suffer adverse economic consequences. The tribes' legal challenges to such a settlement could require many years to resolve. Accordingly, immediate protection and relief for the hundreds of thousands of Maine citizens living in the claims area can be achieved only by arriving at a bargained settlement in advance of litigation.

The tribes would not accept the terms recommended by Judge Gunter. After extensive discussions over the role to be played by the federal government in the resolution of these claims, the Administration concluded that an early, partial settlement on the terms outlined in the Basic Agreement (Part A of the Joint Memorandum) was in the best

interests of the citizens of Maine living in the claims area, of the tribes, and of the federal government. The Basic Agreement does not increase the risk or exposure either of the State of Maine or of the remaining private defendants. Indeed, in some respects, the remaining private defendants are the most substantial beneficiaries of the Basic Agreement, because they will have more acres cleared by the legislation than any other party.

Neither the Task Force nor the Administration assigns relative degrees of guilt to the different defendants. Exposure, of course, varies. The respective defendants' ability to litigate the claims effectively and defend themselves fully also varies. The Administration's overriding concern in attempting to achieve a fair resolution of these claims has been the protection of small property owners. The settlement outlined in the Basic Agreement, if approved by Congress, provides that protection.

7. Land Acquisition Costs

No final settlement has been approved with respect to the Narragansett claims in Rhode Island. Moreover, as pointed out in response to question 5, the Administration considers each claim in each state as unique. The facts of the claims differ. The capacity of the defendants to protect themselves or to survive the adverse economic consequences of the pending claims varies. The tribes' demands and legitimate claims and needs vary. Property values are also different in different communities.

Of course, if the private land owners in Maine agreed to settle with the tribes, they would receive a complete release of all the tribes' claims. The release would include claims to almost 3 million acres of land having a current fair market value in excess of 300 million dollars. In view of the members of the Task Force and of the Administration, that release would have a value substantially greater than the 1.5 million dollar cash payment to be made by the federal government to the private land owners should they participate in such a settlement. Accordingly, a settlement on such terms cannot fairly be characterized as providing the large property owners only $5 per acre.

8. Payments to Interior Department

The Tribes have requested that the Secretary of the Interior be a conduit for the State contribution to be added to the trust fund of the tribes. A preliminary report on the economic consequences of a land claim settlement was recently commissioned by the Tribes, and that report recommends that the bulk of the monetary portion of any settlement be invested in the State of Maine.

9. Baxter Park Easement

With respect to the easement for religious use of certain areas in Baxter State Park, it is our understanding that the tribes merely request formal permission to do something which they can now do with approval of the Baxter State Park Commission or other proper authorities.

10. Responsibility for Services

The provision of State services on Indian reservation lands is for the most part a matter left to the sound discretion of the States. One possible exception is the provision of educational services which the courts have held must be provided to all children within a State on an equal basis. Brown v. Board of Education, 347 U.S. 483 (1954). However, under the Impact Aid program administered by the Office of Education at HEW the Federal government pays local public school districts to make up for the tax exempt status of Indian reservation lands. With respect to highway maintenance and improvement and forest fire protection, the practice has been in the West that the States only maintain those roads on the State highway system, while the Federal and Tribal governments are responsible for all other roads. State forest fire protection has not been extended to forest areas owned by the United States in trust for Indians.

11. Changes in Federal Assistance Patterns

The following information is based upon the assumption that any land, no matter how it is acquired by the tribes, will become federal reservation land.

Parks - Federal funding for the purchase of park and recreation land by state and local governments comes from the Land and Water Conservation Fund (LWCF) which is administered by the Department of the Interior. The distribution of LWCF money is based on a formula contained in the statute which establishes the program. The loss of existing state parklands by Maine or the acquisition of lands now being held privately by the tribes would not increase Maine's LWCF eligibility.

Federal Highway Trust Fund - Creation of a federal reservation in Maine will not increase the amount of money which will be paid to the state under the Federal Highway Trust Fund. However, the reservation land will be considered public land for the purposes of determining the state's required matching share. The amount of money coming to the state will not increase, but the amount of money which the state will have to put up as a match will very likely be reduced.

Other Assistance - The Department of the Interior administers a program of building and repairing reservation roads and bridges. Funds are appropriated to the Department of Transportation, but are administered by Interior. These funds are distributed on a formula basis which takes into account reservation land area, population and existing road mileage. Creation of a reservation would direct some of this money into Maine.

Federal Impact Aid to local school districts, which is administered by the Department of Health, Education and Welfare, could also increase. Impact Aid is based upon a formula which considers the number of children whose parents are living or working on federal land.

It is possible that the funding might increase under the Indian Education Act which is also administered by HEW. Funding under this Act is directed toward specific programs, so it is difficult to determine what the pattern of increase might be.

All of the above is in addition to funding which will come to the tribes through the Bureau of Indian Affairs and the Indian Health Service. It is also anticipated that the Maine tribes will be eligible to participate in other federal programs which have special Indian "set

asides" such as Labor's Comprehensive Employment and Training Act program, the programs of the Economic Development Administration and the Department of Housing and Urban Development's low income housing programs, all of which should have a positive impact on the general state of Maine's economy.

12. Contribution from Massachusetts

The State of Maine and its citizens, corporate and individual, are the current holders of the lands claimed by the tribes in this area. The State and its citizens, of course, are free to assert any claim which they feel would be appropriate against the State of Massachusetts as a prior holder of this land. The value, if any, of such a claim would appear affected by the fact that Maine and its successors in title, have held and used the land in question for approximately 150 years of the 200-year period. Such injury as the tribes have suffered results from the loss of use of the land during that period, and from the loss of possession today. Massachusetts cannot restore possession of the land, and no evidence has been submitted to us by your office demonstrating that Massachusetts has benefitted substantially from the allegedly void transfers. Have you any such evidence?

We are not in a position to determine whether Maine did know, should have known, or would be presumed under the law to have known of the tribe's potential claims at the time Massachusetts transferred its rights (and, presumably, its liabilities) with respect to the land to Maine. What is your assessment of the law and evidence relating to that issue?

Sincerely,

Leo M. Krulitz

Eliot R. Cutler

A. Stephens Clay

cc: Honorable James B. Longley
Honorable Robert Lipshutz
Honorable Edmund S. Muskie
Honorable William D. Hathaway
Honorable William S. Cohen
Honorable David F. Emery
Members of the Maine Legislature

JOSEPH E. BRENNAN
ATTORNEY GENERAL

RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENE

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

March 2, 1978

Honorable Leo Krulitz
Solicitor
Department of Interior
Washington, D.C.

Eliot Cutler
Assistant Administrator
Office of Management & Budget
Executive Office Building
Washington, D.C.

A. Stephens Clay
Kilpatrick, Cody, Rogers, McClatchey & Regenstein
Suite 400
2033 K Street, N.W.
Washington, D.C. 20006

Re: United States of America v. The State of Maine.

Gentlemen:

In the course of our review of the Joint Memorandum of Understanding developed by the White House Work Group and representatives of the Penobscot and Passamaquoddy Tribes, a number of questions have been raised. We believe that, prior to development of any final State position on the proposed settlement, answers to these questions are necessary. It is unfortunate that we did not have an opportunity to pose these questions to the Work Group prior to the preparation of the Joint Memorandum.

1. Past State Payments.

In the past 15 years, the Maine taxpayers have contributed approximately $15,000,000 to provide social services, housing and other support to the Indian Tribes. The federal government now recognizes that it is obligated to provide support for the Indian

Tribes and that it has been obligated to provide support services for many years past because of the trust relationship it now asserts to exist. In light of the present federal position regarding its responsibilities for financial support of the Indian Tribes, is the federal government prepared to reimburse the State of Maine for the support provided by the State in lieu of the federal support which should have been available to the Indian Tribes?

Assuming that the federal government is correct in demanding State participation in a settlement as a quid pro quo for federal involvement (a principle with which we take exception), why were Maine's past payments to the Tribes insufficient to satisfy this principle? Has consideration been given to the fact that none of the other states involved in Trade and Intercourse Act claims, Massachusetts, Rhode Island, Connecticut or South Carolina, ever made similar payments to the Tribes located in those states? In view of Maine's extraordinary efforts (approximately $10 - $15 millio in the last 19 years alone), why is more expected by the federal government from Maine citizens and taxpayers? Why is it fair to Maine to expect more of Maine taxpayers who acted in good faith all these years in taking care of what are now asserted to be federal Tri

2. Integrity of State Laws.

The Joint Memorandum indicates that any lands acquired by the Indians be within the State's criminal and civil jurisdiction subject to "retrocession" which would terminate state authority over the lands. The question of the status of enforcement of state laws on acquired Indian lands would appear to require resolution prior to any settlement because of the many implications involved. For example, in developing new businesses, as is proposed with the $25 million federal contribution, would the Tribes take advantage of exemption from state consumer protection, environmental, work place safety or minimum wage laws to compete unfairly with other Maine business who must remain subject to these laws? What protections, if any, will exist for wild animals and fish which live in or cross the acquired Indian lands? What protections will there be for abutting landowners from such problems as stream siltation, air pollution or noise which may result from uncontrolled industrial and commercial activity, such as clearcutting timber, on Indian-acquired land?

3. Tax Losses.

At current rates of taxation ($0.75 - $0.80 per acre) the State will lose at least $400,000 a year in taxes on the 500,000 acres which it is proposed that the Indians would acquire. Assuming an increase in this tax rate over the course of time, this tax loss will surely increase. Will this be the limit of tax losses or will there be other tax losses? For example, will all improvements on

this property be exempt from State taxation? Will business transactions on this property be exempt from State sales and income taxes? Would the exemption from State sales and income taxes be limited to transactions between Indians or would the exemption, if there is to be one, also extend to transactions between Indians and non-Indians? We understand that there is litigation in process in Washington State to determine whether an Indian Tribe can sell tax free cigarettes to non-Indians. The sale of such cigarettes has cost the State of Washington an estimated $8 - 14 million in lost revenues already. Is there likely to be a similar problem in Maine with lost taxes?

4. Easement Uses and Fish and Game Laws.

The proposed settlement requests the Indians be given easements to hunt and fish and collect brown and y e l l o w ash on approximately 3 million acres. How intensive a use is contemplated under these easements? Will the uses under these easements be subject to State criminal laws, fish and game laws, and other necessary State controls designed to prevent abuse of land and resources?

5. Other Indians in Maine.

The Joint Memorandum makes no provision for claims of or federal support for other Indians in Maine, i.e., the Micmac and Maliseet (Malicite). It is entirely possible, however, that either or both of these tribes may assert against the State the same kind of claims asserted by the Penobscot and Passamaquoddy. Indeed, it has curiously been ignored that the 1794 agreement that forms the basis of the Passamaquoddy claim was executed by Massachusetts, not only with the Passamaquoddy, but other eastern tribes, which appears to include the Micmac and Maliseet. What precedential value will the proposals in the Joint Memorandum have on these other latent claims? Is the federal government prepared to extinguish these other claims? Will the federal government take the same posture toward settlement in those cases as it does in this?

6. Changes from the Gunter Plan.

The Joint Memorandum contains an agreement by the White House to extinguish the Tribal claims to 9,200,000 acres in return for a payment of $25,000,000. This is in contrast to Judge Gunter's proposal to extinguish claims to 12,000,000 in return for the same amount of money. Why did the White House decide to still pay $25,000,000 to the Tribes but extinguish a smaller amount of the claim? Since we understand the original proposal of Judge Gunter to have been characterized generally by President Carter as fair and equitable, why did the White House retreat from the position of Judge Gunter that no private landowners be held responsible? Does the White House now take the position that indeed some landowners are, because of the size of their holdings, more guilty than others and less deserving of the protection originally fashioned by Judge Gunter? If so, why?

7. Land Acquisition Costs.

The federal government proposes to assist the Indians in acquiring approximately 300,000 acres of land from private landowners for a payment of approximately $1.5 million, or $5 an acre. At the same time, we understand that a tentative settlement has been reached in a similar suit in Rhode Island, that involves a proposal under which the federal government will acquire land for the Narragansett Tribe at fair market value. Assuming that the federal government agrees to assist in that settlement by acquiring land at fair market value, why should Maine lands purchased to resolve a similar dispute be acquired for far less than fair market value? Is the federal government prepared to reconsider its position and pay prices at or near fair market value for land acquired in Maine?

8. Payments to Interior Department.

The proposed settlement contemplates that any payments by the State to the Indians be paid through the Interior Department. If the settlement is to be between Maine and Maine's Indians, why should the Interior Department play a middleman role in payments? Would it be preferable to keep the money in Maine by making any payments from Maine direct to Maine's Indians without channeling the funds through a Washington bureaucracy which might mandate uses of the funds in a way desired by neither the State nor its Indians?

9. Baxter Park Easement.

The Indians have requested, as part of the settlement, a religious easement in Baxter State Park. Precisely what uses are contemplated under this easement? By this request for an easement, do the Indians seek special privileges not accorded to other citizens, or are they merely requesting permission to do something which they could now do with approval of proper authorities?

10. Responsibility for Services.

It has been suggested that the Indians would undertake a number of economic development projects with funds received as part of the settlement. Such projects will necessarily increase demand for certain services traditionally provided by the State, such as highway maintenance and highway improvement and forest fire protection. Will the State continue to be called upon to supply such services, or will such services all be provided with the $3 to $5 million a year which the federal government contemplates giving to the Indians?

11. Changes in Federal Assistance Patterns.

If the Indians acquire the land they are seeking, will the federal government provide a greater level of assistance to Maine to acquire more park lands for use by all Maine citizens? Similarly, if the Indians acquire the lands they are seeking, will those lands be deemed federal public lands so that the State will receive an increase in the funds the State is paid under the Federal Highway Trust Fund? Are there other areas in which federal aid patterns to the State would change - for better or worse - as a result of the Indian settlement?

12. Contribution from Massachusetts.

The agreements ("treaties") of 1794, 1796 and 1818 which form the bulk of the claim against Maine and its citizens were in fact executed by Massachusetts. Assuming arguendo that these agreements were made in violation of the Trade and Intercourse Act, it must be concluded that the State of Massachusetts perpetrated these "wrongs." Inasmuch as Maine was only assigned the treaties when it became a State, an assignment imposed upon it by Massachusetts as a condition of its statehood, why was no consideration given to, in fairness, demanding a contribution from the State of Massachusetts? Are citizens of present day Maine any more responsible for the events of 200 years ago than the citizens of present day Massachusetts?

I look forward to your answers since they will affect our response to the proposals in the Joint Memorandum.

Sincerely,

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

JEB/ec

cc: Honorable James B. Longley
Honorable Robert Lipshutz
Honorable Edmund S. Muskie
Honorable William D. Hathaway
Honorable William S. Cohen
Honorable David F. Emery
Members of the Maine Legislature

Speeches file

THE WHITE HOUSE
WASHINGTON

Ron Elliott

212-582 3370
Elliott Cutler

@ Park Lane Hotel
N.Y.

4/17/78

- Went fairly well.
- 2 letters from Governors to Elliott Cutler waiting.
- But a disturbing 2 hours with representatives of big trusts.
- Small press conference after speech.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FOR RELEASE ON DELIVERY
Friday, April 14, 1978

REMARKS OF
ELIOT R. CUTLER
ASSOCIATE DIRECTOR FOR NATURAL RESOURCES,
ENERGY AND SCIENCE
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
HUSSON COLLEGE BUSINESS BREAKFAST
BANGOR, MAINE

Last week the White House Work Group announced that the Penobscot and Passamaquoddy Tribes had agreed to extend for one month the time available for the State of Maine and the large landholders to respond to the Tribes' settlement proposals.

On or shortly after May 10, the Administration will file legislation to clear title to 9.2 million acres of land in the 12.5 million-acre claims area in order to provide complete protection for most landholders and homeowners. The legislation would provide for a $25 million federal payment to the tribes. On or about June 15, litigation will commence against any other defendants--such as the State and the large landholders--who have not reached an out-of-court settlement with the Tribes. Should the Congress fail to pass the protective legislation, it eventually would be necessary to also bring an action against hundreds of thousands of Maine citizens to recover land held by them.

I know that I speak for my colleagues on the Work Group, for the President's Counsel, Bob Lipshutz, and for the President himself, when I say that we do not want this case to go to court.

Not because we fear that one side or the other may win.

Not because we think that the many historical and legal issues in the case should not be resolved.

But because we are deeply concerned about the chaos, the hardship and the suffering that many years of litigation would inflict upon all the people of Maine.

In short, we think it is unfair to ask the people of Maine to pay the price of litigation.

The period between now and May 10 is a crucial time for all of us. Each day that passes without progress toward a negotiated settlement brings us closer to a costly confrontation in court. Yet I know that each day also brings more questions, more doubts, and more confusion as to what is the right thing to do.

I would like to take the opportunity this morning to discuss five basic questions about this case that I know trouble many Maine citizens and to address in connection with those questions several misunderstandings about the role the Administration has played in this case and the nature of our proposals.

First, why are the Justice Department and the Interior Department preparing to sue the State of Maine? Why are those two federal agencies taking the tribes' side of this case?

To answer that question, we first must go all the way back to 1971. By that time, the Penobscot and Passamaquoddy Tribes had discovered a copy of the 1793 treaty, had taken it to their lawyers, and had asked the Interior Department to assist them in pursuing the matter further. The tribes claimed that the federal government had an obligation to do that under the terms of the 1790 Non-Intercourse Act.

The government turned down the tribes' request, claiming it had no such duty, and the tribes sued Secretary of the Interior Rogers Morton in Federal Court in Portland in 1972. The State of Maine, recognizing that its interests were very much at stake, asked to intervene and became a second defendant in the case in 1973. In early 1975, Maine's District Judge Gignoux decided that the tribes were right: The tribes, he said, were entitled to the protection of the Non-Intercourse Act, and the federal government was a trustee for the tribes under that Act. The government appealed Judge Gignoux's decision to the U. S. Court of Appeals for the First Circuit and again lost in late 1975. No further appeal was taken, even though the state could have sought to vacate the judgment as late as 1977.

This is a nation which lives under the rule of law, and from that time forward the federal government was bound by Judge Gignoux's decision that it owed to the tribes the duties of a trustee.

On that particular subject, that is as far as Judge Gignoux went. He did not order the federal government to sue the state or anyone else. He said only that the tribes were protected by the Non-Intercourse Act and that the federal government had to act as trustee for the tribes. The federal government had to decide, as trustee, whether it had an obligation to bring the present land claims case to court.

But the government's discretion at this point was limited. It is a fundamental principle of trust law--indeed of our legal system in general--that a trustee's foremost duty is to act in behalf of and to protect the interests of those persons to whom the trust obligation is owed. The lawyers at the Interior Department and the Justice Department examined the legal and historical evidence that had been amassed in the land claims case and decided that [illegible]

the federal government had an obligation to do what any reasonable person would do acting in his or her own best interests--it had to pursue the claim and, if necessary, sue the present landholders on behalf of the tribes. As a lawyer, I cannot imagine that any lawyer or anyone in a position of public responsibility would suggest that the government should have done otherwise.

A second question: We accept that. Though we don't like to be sued by the federal government, we accept the fact that the Justice Department has no choice. But why did the President get involved?

Let me assure you that was not an easy decision for the President to make. Certainly there is no political credit to be gained. The easiest course of action would have been to take the case to court and to let the State of Maine and the large and small landholders fend for themselves. Indeed, the previous Administration was prepared to do just that on January 15, 1977.

However, in 1976 the first indications of the potential upheaval and chaos that would result from litigation began to appear. A number of Maine towns in the claims area were having trouble with bond issues, and there was widespread concern that titles to real estate would be questioned in sales and mortgage transactions. The Governor and the Attorney General asked the Maine Congressional delegation for help, and the delegation turned to President Carter.

In early 1977, the President asked the best lawyer he knew, retired Georgia Supreme Court Justice William Gunter, to be his special representative, to listen to the arguments on both sides of the case, to examine the merits, and to recommend any actions which the federal government and

the parties might take to resolve the dispute. In July, Judge Gunter told the President that the claims were serious and substantial, but his proposed terms were rejected as a basis for settlement by both the tribes and the State of Maine.

In August, the President appointed the White House Work Group, and he asked us to enter into further discussions with the tribes concerning federal-tribal relationships. We did that, and another proposal was made in February--one which was more advantageous to the state.

A third question: Why were the Work Group's discussions held only with the tribes? Was the state shut out of the negotiations?

On at least three separate occasions after Judge Gunter's recommendations to the President were made known to state officials, those officials indicated to us that in their view settlement of the case would be inappropriate and that the state preferred to litigate. The repeated refusals by the responsible state officials to consider any settlement to which the state would make a contribution left us no choice; we could not invite the state to participate in negotiations when the state insisted that it would not settle on any terms.

The tribes, on the other hand, expressed a willingness to enter into further discussions. In light of Judge Gignoux's decision, it was imperative that we begin discussing a number of important questions concerning the relationship between the federal government and the tribes. For example, what was to be the level of future federal services?

It became apparent early in those discussions that the issue of a partial settlement with the tribes would be an unavoidable topic. And given our concern for the hundreds of thousands of Maine homeowners and

businesses facing the threat of litigation, it made sense to us to pursue that topic. It also became clear that we could at least explore the possibility of an overall settlement and obtain from the tribes terms on which at least they would be willing to settle.

Had it not been for those difficult and lengthy negotiating sessions, there would not be on the table at this time any settlement proposals to which even one party had agreed.

A fourth question: Why has the "Great White Father" put the State of Maine 'up against the wall?" Why is the Administration trying to force a negotiated settlement?

No one is backed up against a wall. The federal government's efforts over the past year have been strictly voluntary--made at the request of Maine's Congressional delegation. We cannot force a negotiated settlement.

Like Judge Gunter, the Work Group reviewed the tribes claims, the state's defenses, and the pertinent law and historical materials. We reached the same conclusions as Judge Gunter did: The tribes' claims are not frivolous. They are for real. They could be entirely successful in litigation. And the litigation will take many years to resolve, with economic chaos a likely result.

In view of those conclusions, the President authorized us to agree to a partial settlement with the tribes. In exchange for a voluntary payment of $25 million by the federal government, we can clear title and guarantee security for thousands of Maine citizens who own homes and businesses in the claims area, who would suffer the most from litigation,

and who could least afford to risk either the costs of litigation or defeat in court. The Congress must approve this settlement, and anyone who thinks it wise to oppose it can do so. We cannot force its ultimate acceptance by the Congress.

The terms of settlement proposed by the tribes to the state and the large landholders, on the other hand, were set forth without endorsement by the Administration. We neither support those terms nor oppose them. The tribes have made an offer.

As the President said here in Bangor two months ago, "If the Governor of Maine or the fourteen landowners don't want to accept /the offer/, they have three choices. They can either continue to negotiate, they can accept the agreement...and have an end to it, or they can stay in court and litigate. I have no preference about it.... We have not imposed the will of the Executive Branch on the State of Maine at all. The Government of Maine is still completely free to do anything it chooses."

A final question: Isn't is unconstitutional, un-American and unfair to treat large landholders differently from small landholders, homeowners and businessmen?

In responding to this question, I should first point out that it is the opinion of the Justice Department, based on legal precedent, that the proposed 50,000-acre exemption is constitutional. We would not have proposed it if we had not received that assurance.

One of the reasons that it is constitutional is that it is inherently fair. All landholders are treated equally; every person or entity would

have title cleared to 50,000 acres. Indeed, the greatest beneficiaries of this approach--those who would benefit the most from the voluntary $25 million federal contribution--would be those who own the most land.

Second, this proposal is as fair and constitutional as Maine's own growth tax or the federal income tax, where people who own the most timber or have the highest income are taxed at the highest rates.

Finally, this proposal is fair because if the claims are legitimate, those who have benefitted most from any illegal conveyances have the most at stake in this case and can be expected to contribute proportionately more to any resolution of it--in or out of court.

No one is requiring the large landholders to participate in out-of-court settlement. They have the same choices as the state: accept the tribes' offer, negotiate, or litigate. In fact, up until the Administration got involved in this case, there was no settlement offer to which the large landholders could respond.

Small landholders and homeowners do not really have those choices. They generally could not afford to settle on their own; they could not be expected to negotiate individually; and they could not afford the legal expenses or the economic consequences of litigation pending for years and years. And if they lost in court, they could lose their homes and their livelihood. The only fair thing for the federal government to do is to guarantee their security--to protect those who cannot protect themselves.

I know I have taken a good deal of your time this morning, and I appreciate your willingness to listen so patiently. I hope I have clarified some matters, but I am sure you have other questions as well. I will try to answer as many as I can.

But before I close, I would like to read for you one passage from the February Joint Memorandum which I think we all ought to keep in mind.

"If settlement can be accomplished, it will reflect a compromise from every perspective. The tribes regard their claims as worth many times more than any consideration to be received under this agreement. The State of Maine, on the other hand, has taken the position that the tribes' claims are without merit...

"With these considerations in mind, any settlement would reflect a shared understanding of the reality created by the litigation, rather than one party's view of the equity of the claims. The claims are unique, and resolution of them on any basis other than litigation similarly must be unique."

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

NOV 2 1 1978

Thomas N. Tureen, Esq.
Native American Rights Fund
178 Middle Street
Portland, ME 04101

Re: Passamaquoddy and Penobscot
Land Claim Settlement

Dear Tom:

During a recent meeting with the Governors of the two Tribes, members of the Tribes' Negotiating Committee, Assistant Secretary Forrest Gerard and yourself, I was asked to prepare a letter outlining the terms of a complete settlement of the Tribes' claims for land and trespass damages in the State of Maine which the Administration would support before Congress. This letter responds to that request.

The framework of the proposed settlement is described below. Some details remain to be worked out as the legislation is drafted.

In exchange for a complete release of the Tribes' claims, we are prepared to recommend the following to Congress:

1. Payment by the Federal Government of $27 million in trust for the benefit of the two Tribes. Provisions for the trust would be those previously agreed to in paragraph (C)(5) of the Joint Memorandum of Understanding dated February 9, 1978 (MOU).

2. In addition, $10 million will be provided for acquisition of 100,000 acres of timberlands at fair market value, the land to be held in trust for the Tribes. Of this amount, $5 million will be provided by the United States and $5 million will be provided by the State of Maine. The State will be given a credit against their share for past services to the Tribes which past services we understand exceeds the $5 million. As a result, the $10 million will be provided from the Federal Treasury.

3. The land will be acquired through arms length negotiations. The Department of the Interior is prepared to assist the Tribes in these negotiations, if our assistance is requested. Appropriate provisions will need to be included in the legislation for this land acquisition program.

4. The Passamaquoddy and Penobscot Tribes will be federally recognized and entitled to federal services as provided in paragraph (C)(7) of the MOU. The State of Maine will discontinue its services to the Tribes. I assume that individual Indians would be treated like all other citizens of Maine with regard to general state programs.

5. The State of Maine has taken the position that all laws of the State should apply to the newly acquired land. This might be inconsistent to some extent with paragraph 8(C) of the MOU. We have had an initial meeting with State Officials on jurisdictional issues and have agreed to work with the State and the Tribes to try to resolve these issues in a way satisfactory to all concerned.

6. As previously agreed, all property and cash obtained pursuant to this settlement will be divided equally between the two Tribes.

We are willing to work closely with the Tribes and the State to resolve any remaining differences and develope legislation to implement the settlement. We will use the legislation previously drafted as the starting point and revise it to reflect these new agreements. We recognize that this settlement still requires the agreement of the Negotiating Committee, the Tribal memberships and the Congress.

My staff is prepared to work closely with you and the State in the hopes that legislation can be ready for introduction very early in the next session of Congress.

Sincerely,

Leo Krulitz

LEO M. KRULITZ
SOLICITOR

cc: Governor Longley
Attorney General Brennen
Secretary Cecil Andrus
Attorney General Bell
Assistant Secretary Indian Affairs
Mr. Robert Lipshutz
Mr. Eliot Cutler

DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

Department of Justice
Washington, D.C. 20530

June 7, 1979

Mr. Douglas B. Huron
Senior Associate Counsel
The White House

Dear Doug:

Enclosed for your information is a copy of the final of the letter from the Attorney General to Cecil Andrus dealing with the Indian trust responsibility. There have been no substantial changes from the version you reviewed a couple months ago.

I would appreciate it if you would see that copies are distributed to people there in the White House who may have an interest.

Sincerely,

Larry A. Hammond

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

Enclosure

Office of the Attorney General
Washington, D. C. 20530

May 31, 1979

Honorable Cecil D. Andrus
Secretary of Interior
Washington, D.C.

Dear Mr. Secretary:

As you know, the Department of Justice has long represented the United States in litigation for the purpose of protecting Indian property rights secured by statutes or treaties. This has been and will continue to be an important function of this Department, and I would like to set forth my understanding of the legal principles governing its conduct.

In fulfillment of the special relationship contemplated in the Constitution between the Federal Government and the Indian tribes, the Congress has enacted numerous laws and the Senate has ratified numerous treaties for the benefit and protection of Indian tribes and individuals, their property and their way of life. Where these measures require implementation by the Executive Branch, the administrative responsibility typically resides with the Secretary of the Interior. 43 U.S.C. § 1457 (10). The Attorney General is in turn responsible for the conduct, on behalf of the United States, of litigation arising under these statutes and treaties. This obligation in Indian cases is but one aspect -- albeit an important one -- of the Attorney General's statutory responsibility for the conduct of litigation in which the United States or an agency or officer thereof is a party or is interested. 28 U.S.C. §§ 516, 519.

The Secretary of the Interior and the Attorney General perform their duties here, as in all other areas, under the superintendence of the President. We are the President's agents in fulfilling his constitutional duty to take care

that the laws be faithfully executed. Where a particular statute, treaty, or Executive Order manifests a purpose to benefit all Indians or a tribe or individual Indians or to protect their property, it is the obligation of the responsible Executive Branch officials to give full effect to that purpose. In your role as Secretary of the Interior, you are charged with administering most of the laws and treaties applying to Indians and are often in a policy formulating role with regard thereto. And where litigation is concerned, it is the duty of the Attorney General to ensure that the interest of the United States in accomplishing the congressional or executive purpose is fully presented in court.

The Executive and Judicial Branches have inferred in many laws extending federal protection to Indian property rights the intent that the Executive act as a fiduciary in administering and enforcing these measures. Where applicable law imposes such standards of care, faithful execution of the law of course requires the Executive to adhere to those standards. Thus, it in no way diminishes the central importance of our respective functions to acknowledge that they find their source in specific statutes, treaties, and Executive Orders or to recognize that they are to be performed with the same faithfulness to legislative and executive purpose as are the obligations devolving upon this branch of the federal establishment generally.

A significant portion of the litigation with which we are here concerned relates to property rights reserved to a tribe by treaty or in the creation of a reservation or property which Congress has directed be held in trust, managed, or restricted for the benefit of a tribe or individual Indian. When the Attorney General brings an action on behalf of the United States against private individuals or public bodies to protect these rights from encroachment, he vindicates not only the property interests of the tribe or individual Indian, as they may appear under law to the United States, but also the important governmental interest in ensuring that rights guaranteed to Indians under federal laws and treaties are fully effective.

There is no disabling conflict between the performance of these duties and the obligations of the Federal Government

Indians, faithful execution of the laws require the Attorney General to resolve these competing or overlapping interests to arrive at a single position of the United States. In arriving at a single position, however, we must also take into account the rule of construction now firmly established that Congress' actions toward Indians are to be interpreted in light of the special relationship and special responsibilities of the government toward the Indians.

And, finally, the President's duty faithfully to execute existing law does not preclude him from recommending legislative changes in fulfillment of his constitutional duty to propose to the Congress measures he believes necessary and expedient. These measures may -- indeed must -- be framed with the interest of the Nation as a whole in mind. In so doing, the President has the constitutional authority to call on either of us for our views on legislation to change existing law notwithstanding the duty to execute that law as it now stands.

I look forward to close cooperation between our two Departments in these matters.

Yours sincerely,

Griffin B. Bell

Griffin B. Bell
Attorney General

Maine Indian Tribal-State Commission
Minutes of September 12, 1995

MITSC Members Present

John Banks	Cliv Dore	BennettKatz, Chair
Anthony "Mike" Best	Mark Chavaree	Matt Manahan
Paul Bisulca (nonvoting member)	Fred Hurley	

Other Persons Present

Wes Francis, Central Maine Indian Association
Thomas Harnett, Assistant Attorney General
Diana Scully, MITSC Executive Director
D.V. Shields, Consultant, Ecosystem Protection
David Westphal, Acadia FilmVideo

Meeting Convened

The September 12, 1995, meeting of the Maine Indian Tribal-State Commission, originally scheduled to begin at 11:30 AM, was convened by Chair Bennett Katz at approximately 1:35 PM in room 107 of the State Office Building in Augusta.

Remarks by the Chair

Mr. Katz reported that the Legislature's Judiciary Committee had just held a hearing on the nomination of John Patterson to the Maine Indian Tribal-State Commission and he received just 3 votes. (Earlier, the Committee had supported the nomination of Evan Richert to the Commission.) During the hearing, concerns were expressed that the Commission has done very little reporting about the effectiveness of the Settlement.

Mr. Katz said that he and Tribal Representative Paul Bisulca had approached House Majority Leader Paul Jacques about submitting a bill to address the finances and other needs of the Commission. They discussed expanding the Commission's membership and increasing its funding.

Mr. Katz noted that Governor Cliv Dore had told him that if John Patterson was approved to serve on the Commission, the Passamaquoddy Tribe no longer would be part of the Commission. He stated that if he were Governor King, he would not be feeling too kindly about the outcome of his nomination.

Mr. Katz also expressed concern that the Commission was excluded from a recent meeting involving Governor King's Office, the U.S. Department of Interior, and the Penobscot Indian Nation. He concluded that the Commission has challenges and stated his hope that all parties share a commitment to make it stronger.

John Banks said that he was encouraged by the remarks of the Judiciary Committee, because they saw that the Commission is not taken seriously. The Commission spends a lot of time developing positions and having things go nowhere beyond the Commission. He thought the Judiciary Committee would be willing to listen. Mr. Katz said that he would write a letter to the Judiciary Committee to clarify issues raised.

Minutes; Financial Reports

Mr. Katz reviewed six actions taken during the Commission's meeting of June 16, 1995. He pointed out that these needed to be validated because there had not been a quorum:

- Accepting the minutes from the Commission's meeting of March 16, 1995.
- Accepting the financial report.

into a distribution agreement with the Native American Public Broadcasting Consortium, upon the satisfactory negotiation of details in the agreement.

Reverend Roger Smith said that the Native American Project of the Episcopal Diocese would like to make another contribution to help with the distribution of the Wabanaki video to the schools and/or through the churches.

Meeting Adjourned

The meeting was adjourned at approximately 3:45 PM.

Maine Indian Tribal-State Commission
Minutes of September 25, 1996 Meeting

MITSC Members Present

John Banks
Paul Bisulca [nonvoting member]
Anthony "Mike" Best
Mark Chavaree
Fred Hurley
Governor Cliv Dore
Bennett Katz, Chair
Matt Manahan
Fred Moore [nonvoting member]
Evan Richert
Vendean Vafiades

Other Persons Present

David Attean, Penobscot Indian Nation
Tamis Coffin, Penobscot Department of Natural Resources
Charles Polches, Passamaquoddy Tribe at Indian Township
Diana Scully, MITSC Executive Director
Roger Smith, Chair, Maine Task Force on Tribal-State Relations
David Westphal, Acadia FilmVideo & sister

Meeting Convened

The September 25, 1996, meeting of the Maine Indian Tribal-State Commission, was convened by ChairmanBennett Katz at 11:15 PM at the Penobscot Community Building on Indian Island.

Minutes and Updates

It was moved, seconded and unanimously agreed to accept the minutes from the Commission's meeting of April 18, 1996

Diana Scully reported that *Wabanaki: A New Dawn* was one of four films to receive an award from the American Anthropological Association and that filmmaker David Westphal would travel to San Francisco at his own expense for the November 20 award ceremony. Also present at the ceremony will be one of the video's advisors, anthropologist Prins. There will be a screening of the video in San Francisco on November 22. Chairman Katz offered congratulations on behalf of the MITSC to Mr. Westphal. *It was suggested the Ms. Scully prepare a press release about the award and explore the possibility of distribution through the American Anthropological Association.*

Ms. Scully gave an update on the State's performance based budgeting process and the MITSC's response to it. She reported on her attendance at an August meeting of the Commission on Performance Based Budgeting during which she had an opportunity to provide information about the MITSC and explain why, even though performance based budgeting is a good idea, the State's process does not make sense for the MITSC. She noted that Evan Richert is a member of this Commission and that it seemed as though at least some of its members understood why the MITSC is different than other state agencies. *It was agreed that Ms. Scully should contact the Commission on Performance Based Budgeting, with copies to the*

that she does not have a concern about the provision and suggested that one could say that when anything affects the taking of fish, it is under the MITSC's jurisdiction. Mr. Manahan asked whether it would make sense to apply this only to those who are fishing. Mr. Hurley pointed out that the only boats on the lake are fishing and that other property owners have expressed strong support for the prohibition of motors. Mr. Richert noted that motors can disturb and affect fisheries.

Mr. Manahan stated that perhaps the MITSC should deal with the perceived conflict. Mr. Richert urged the MITSC to vote on the earlier motion. *The vote on the earlier motion was unanimous with one MITSC member absent.* A brief discussion followed the vote about how to proceed administratively to propose the new rule. Ms. Scully said a hearing is not required, the Settlement Act requires the MITSC to follow the Administrative Procedures Act, and that the language for the rule will be developed.

Conflict of Interest

Chairman Katz told Mr. Manahan that he should recuse himself when there is an actual or a perceived conflict of interest. Mr. Manahan replied that he has recused himself when there has been a conflict, will not participate when there is, and does not believe that he has a conflict in the bigger question of rules by the MITSC.

Governor Dore pointed out that Mr. Manahan would be voting on something that could have precedent down the road and stated that the State appointees to the MITSC should not vote when there is a conflict. Representative Bisulca said that he does not have a problem with the Tribe or State vigorously defending its views, but when the MITSC gets involved in issues regarding the scope of the Settlement Act it is in the companies' interest for the scope to be narrower. Mr. Manahan noted that what others are saying is that he can play no meaningful role in the MITSC. Representative Bisulca said if he had known of the conflict earlier he would have done something.

Mr. Banks stated that Mr. Manahan had agreed to recuse himself from any discussions involving fishing. Mr. Manahan said he referred to fishing that affects his clients. Mr. Banks commented that because Mr. Manahan's clients have taken position on fishing, there is a conflict. Mr. Manahan indicated that Governor King has not asked him to step down. Mr. Best stated that he cannot be open on issues before the MITSC, that Tribal leaders have told him to be quiet, and that this is a problem. Governor Dore mentioned that the Tribe would have opposed Mr. Manahan's nomination, just as they did John Patterson's, if they had known he represents a client with whom the Tribe has very adversarial relations.

Indicating that all members have gone through an appointment process, Mr. Richert said the MITSC does not have the right to kick anyone off its board. He shared his regret that the level of trust is such that any expansion or shrinking raises a conflict. Mr. Richert stated that the MITSC must handle the conflict of interest issues as any group would do: When a member thinks there is a conflict that person raises the conflict and recuses himself.

Electronic Rule

Ms. Scully explained that the Fishing Subcommittee was recommending that the MITSC support the conversion of its existing rule to an electronic data base. No substantive change was made in the MITSC's rule, but a rule-making process was required to convert it to the electronic data base. *It was moved by John Banks, seconded by Fred Hurley, and agreed by the MITSC to approve the conversion of the MITSC's rule to the electronic data base.*

Broad Exercise of Rules

John Banks explained the Fishing Subcommittee's recommendation concerning the proposal for the MITSC to exercise its authority to adopt rules on all waters under its jurisdiction within Penobscot Indian Territory. Mr. Banks said that this would avoid problems of the past (such as Duncan Pond), help further educate people about the MITSC and the waters on Tribal Trust lands, and give the MITSC an opportunity to focus on this important area of responsibility. Mr. Hurley said that this could be a positive step and could fit in with the

DIFW's process of updating its rules for next year. Representative Bisulca said he proposed the broad exercise of rules because he felt a more radical approach is needed. Noting that this goes back to the original intent of the Settlement Act, he said the Penobscots can assist in its implementation. He suggested that the MITSC should look at issuing licenses to finance this. The enforcement could be done in conjunction with DIFW and the Penobscot Indian Nation and the MITSC could make this self-funding.

Governor Dore said he had a problem with the MITSC brushing aside issues. He said he brought an issue before the MITSC a year ago involving a state warden on Tribal Land harassing a Tribal Member and nothing has been done. He said he wants money returned and an apology to the Tribal Member. He emphasized that hunting and fishing is the exclusive jurisdiction of the Tribe and questioned why the State is licensing in these areas. When Representative Bisulca asked how this relates to the issue under consideration, the Governor replied that it doesn't.

Mr. Manahan asked whether the broad exercise of authority by the MITSC would be duplicative of DIFW activities. Mr. Hurley replied that there is an effort to publish rules jointly so there is not confusion. People would need only one license.

Paul Bisulca moved that the MITSC adopt rules over bodies of water in Penobscot Territory under the MITSC's jurisdiction, as identified in the MITSC's pamphlet entitled "Fish and Wildlife Provisions under the 1980 Maine Indian Claims Settlement". There was no second.

Chairman Katz asked about a fiscal note. Representative Bisulca replied that DIFW and the Penobscot Department of Natural Resources would help. Chairman Katz asked if there was hesitation about moving forward before having more details. Mr. Banks urged the MITSC to move ahead on rules and deal with licensing and permitting at a future meeting. Mr. Hurley suggested that the Penobscots could go back and develop rules and bring these to the MITSC and then figure out licensing and permitting. Governor Dore said fees and fines involved with the utilization of these waters should go to the Tribes. Chairman Katz asked whether the Tribal Councils should consider this. Representative Bisulca responded affirmatively, but suggested that, first, the Subcommittee should work with the Tribe, DIFW, and Ms. Scully to develop the proposal a little better, including its cost.

It was moved, seconded, and agreed to support the MITSC's exercise of jurisdiction over all waters in Penobscot Territory, as identified in the MITSC's pamphlet entitled "Fish and Wildlife Provisions under the 1980 Maine Indian Claims Settlement" and to have the MITSC's Fishing Subcommittee further develop the details of the proposal. The vote was 7 in favor and 2 abstentions (Mike Best and Governor Dore).

East Branch Penobscot River Stakeholders

Mr. Banks described the proposed management plan for the East Branch Penosbcot River Drainage. At present, Bowater owns 60% of this area and Bangor Hydro owns 40%. Bowater is proposing to take over the Bangor Hydro share and they want to see if there is a water use regime that all stakeholders can accept. At Bowater's invitation, a committee of stakeholders has developed a report, which Bowater is considering. Mr. Banks thought the MITSC should be aware of this, because it has regulatory authority over First Lake Mattagamon. *Mr. Banks asked Ms. Scully to distribute the report to the MITSC members.* Ms. Scully commented that Bowater has been sending information to the MITSC about the stakeholders group and, so considers the MITSC to be a stakeholder

Atlantic Salmon Task Force

There was discussion about correspondence regarding comments made during a meeting of the Atlantic Salmon Task Force. [Mr. Banks had written about comments by Libby Butler, Chief Counsel to Governor King, that the Atlantic Salmon Authority has sole authority to manage and regulate Atlantic Salmon fishing, including on waters under the MITSC's jurisdiction. Ms. Butler wrote in response that the focus of the Task Force was on developing "a plan to conserve salmon in the seven 'downeast rivers' (the Dennys, East Machias, Machias, Narraguagus, Pleasant, Ducktrap, and Sheepscot)".] Mr. Banks said that during the

meeting he asked which waters they were talking about and the DIFW Commissioner replied that they were talking about the statewide plan. Mr. Banks then said the MITSC should be involved because of the Penobscot and St. Croix Rivers. Governor Dore asked whose jurisdiction: the State's, the MITSC's, the Atlantic Salmon Authority's, or the Tribes? Representative Bisulca said he worked hard to get two Indian representatives on the Atlantic Salmon Authority.

FY 1997 Budget

Ms. Scully provided background information about the budget for FY 1997. She reminded MITSC members that the preliminary budget, approved during their April, 18, 1996 meeting, had included a $7,500 balance, since it was not a given that the Tribes would match the $7,500 increase appropriated by the State. She reported that the MITSC had heard from Mr. Banks that the Penobscot Indian Nation intended to match the State's increase [by $3,750], but she had not yet received official word from the Passamaquoddy Tribe about their intentions.

Governor Dore said the Passamaquoddy Tribe will not support the additional assessment, but will support the basic assessment. He said the check to the MITSC requires two signatures, including his. Mr. Best said the Passamaquoddy Tribe has a bigger problem with the MITSC than the money. Mr. Hurley said it is too bad this is happening now, especially with the Task Force on Tribal-State Relations which soon will be reporting out its recommendations for the MITSC. Mr. Richert commented that this undermines the one group that might be able to address these things. A year ago a group went to the Legislature to try to shore up the MITSC. Mr. Best responded that the summary of minutes since the Settlement reflects an undermining of the Tribes. He said if the Tribe does not feel it is getting what it is supposed to get, it will not pay. Mr. Bisulca said he brought things up a year ago and hoped that the Penobscot Indian Nation does not renege. Mr. Katz stated, "This is a fascinating exercise in human relations. Am I proud of the MITSC's product after 3 years? No. But we are the best game in town."

Taxation

Mr. Best said during a meeting with Governor King at Indian Township, there was discussion about Passamaquoddy concerns about taxation. Mr. Best indicated that Governor King agreed that this was unfair, but it has been two years since that meeting and nothing has happened. Mr. Best said he has information from the Bureau of Taxation about alienated lands paying taxes to the State. He said there are people living at Indian Township paying property taxes to the State. The Tribe provides them with fire protection; yet these people pay taxes to the State when the State does nothing for them.

Mr. Richert noted that he had discussed this 2 weeks ago with Chuck Hewitt and Elizabeth Butler of Governor King's staff and that Brian Mahaney, the State's Director of Taxation, has been speaking with someone at Indian Township about this. Mr. Banks asked whether this is land within the reservation and asked how this could be happening. Mr. Best replied that the State had given lots to people. *Chairman Katz said if Mr. Best would write a letter with Ms. Scully, he will take it to Governor King.* Governor Dore added that there are alienated islands on the St. Croix and the taking of tribal lands on the reservation....

Other Matters

Mark Chavaree and Matt Manahan agreed to serve on a subcommittee to work with Ms. Scully to devise a plan for using the $7,500 balance of funding from the Maine Department of Transportation....Representative Bisulca had asked for an item to be placed on the agenda about amending the MITSC's bylaws to provided for Executive Sessions. Chairman Katz said he did not think this is necessary....Ms. Scully provided a quick update on the work of the Maine Task Force on Tribal-State Relations.

The meeting adjourned at approximately 2:50 P.M.

WARNING ABOUT EATING FRESHWATER FISH

Warning: **Mercury in Maine freshwater fish may harm the babies of pregnant and nursing mothers, and young children.**

SAFE EATING GUIDELINES

- **Pregnant and nursing women, women who may get pregnant, and children under age 8** SHOULD NOT EAT any freshwater fish from Maine's inland waters. Except, for brook trout and landlocked salmon, 1 meal per month is safe.

- **All other adults and children older than 8** CAN EAT 2 freshwater fish meals per month. For brook trout and landlocked salmon, the limit is 1 meal per week.

It's hard to believe that fish that looks, smells, and tastes fine may not be safe to eat. But the truth is that fish in Maine lakes, ponds, and rivers have mercury in them. Other states have this problem too. Mercury in the air settles into the waters. It then builds up in fish. For this reason, older fish have higher levels of mercury than younger fish. Fish (like pickerel and bass) that eat other fish have the highest mercury levels.

Small amounts of mercury can harm a brain starting to form or grow. That is why unborn and nursing babies, and young children are most at risk. Too much mercury can affect behavior and learning. Mercury can harm older children and adults, but it takes larger amounts. It may cause numbness in hands and feet or changes in vision. The Safe Eating Guidelines identify limits to protect everyone.

Warning: **Some Maine waters are polluted, requiring additional limits to eating fish.**

Fish caught in some Maine waters have high levels of PCBs, Dioxins or DDT in them. These chemicals can cause cancer and other health effects. The Bureau of Health recommends additional fish consumption limits on the waters listed below. Remember to check the mercury guidelines. If the water you are fishing is listed below, check the mercury guideline above and follow the most limiting guidelines.

SAFE EATING GUIDELINES

Androscoggin River Gilead to Merrymeeting Bay:---------- **6-12** fish meals a year.
Dennys River Meddybemps Lake to Dead Stream:---------- **1-2** fish meals a month.
Green Pond, Chapman Pit, & Greenlaw Brook
(Limestone):----------**Do not eat any fish from these waters.**
Little Madawaska River & tributaries
(Madwaska Dam to Grimes Mill Road):----------**Do not eat any fish from these waters.**
Kennebec River Augusta to the Chops:----------**Do not eat any fish from these waters.**
Shawmut Dam in Fairfield to Augusta:------ **5** trout meals a year, **1-2** bass meals a month.
Madison to Fairfield: ---------- **1-2** fish meals a month.
Meduxnekeag River: ---------- 2 fish meals a month.
North Branch Presque Isle River---------- 2 fish meals a month.
Penobscot River below Lincoln:---------- **1-2** fish meals a month
Prestile Stream:---------- 1 fish meal a month.
Red Brook in Scarborough: ---------- **6** fish meals a year.
Salmon Falls River below Berwick: ---------- **6-12** fish meals a year.
Sebasticook River (East Branch, West Branch & Main Stem)
(Corinna/Hartland to Winslow):----------2 fish meals a month.

For more details, including warnings on striped bass, bluefish and lobster tomalley call (207)-287-6455 or visit our web site at janus.state.me.us/dhs/bohetp/index.html

Revised August 29, 2000
Environmental Toxicology Program
Maine Bureau of Health

BULLETS FOR CAROL BROWNER
CALL 10/16/00

The four Maine Tribes ask the EPA to retain federal NPDES jurisdiction on Indian lands and waters in Maine.

We request that EPA uphold it's Federal trust responsibility to Tribes to protect their homelands from environmental degradation and to promote a healthy Tribal culture.

Retention of NPDES permitting authority by EPA would affect less than one-tenth of one percent of the land of State of Maine and would provide a mechanism to protect the Tribe from acculturation.

The Settlement Acts do not give the State the unilateral authority to affect the environment in a manner that will negatively impact our culture and traditions.

EPA has collected Environmental Justice data that shows that because of cultural and sustenance practices, Tribes are disproportionately impacted by environmental contamination.

EPA should not now ignore the direct relationship between Tribal culture, the environment and the health of Tribal members, when making a decision on the State's NPDES application.

× The State of Maine has failed to incorporate Tribal environment or cultural impacts into State decision-making processes.

State of Maine fails to consider Tribal cultural/environmental impacts

The State has failed to take any actions to address the disproportionate environmental and health impacts that state decisions have had on its Tribal citizens.

× The State of Maine has no law, policy or guidance incorporating Tribal concerns into the environmental regulatory process. Neither Maine's Water Quality Standards, nor its Risk Assessment Methodology, address Tribal cultural values or require Tribal concerns be incorporated into the process.

× Maine's Governor, legislature, state agencies and State Attorney General have steadfastly refused to address, or incorporate Tribal environmental or cultural factors into state environmental decision-making.

In 1996, the 117th Maine legislature created "The Task Force on Tribal-State Relations Among its recommendations were the following: 1) The state should create an advisory committee on Tribal-State relations "to provide a forum for discussing any aspect of

Tribal-State relations and concerns"; 2) The Governor of Maine should issue an Executive Order requiring Executive Branch agencies to take into account tribal needs and concerns in the development of legislation, rules polices and programs; and 3) The "Micmacs and Maliseet each should have a non-voting representative in the Legislature", on par with the Passamaquoddy and Penobscot. The State has disregarded all three recommendations.

Maine has proposed that State NPDES permits be issued by the DEP and a Board of Environmental Protection (Board). Under Maine law, the Board will have the authority to issue any permit that involves important policy or legal issues or that has generated substantial public interest. (38 M.R.S.A Sec. 341-D(2)) Any party may request the Board assume jurisdiction over a permit application or modification, or the Board may vote to take over the permitting process for a discharger. While the Board is labeled under the law as part of the DEP, its members are appointed by the Governor for four year terms. (38 M.R.S.A Sec. 341-C) No Indian has ever been appointed to the Board.

Based on the State's record, and its position on Tribal issues, there is little chance that a Governor appointed Board will act to protect Tribal interests that are at odds with those of the Governor or the Maine business community. (E.g. Governor King appointed Matthew Manhattan, an attorney with the law firm of Pierce Atwood to sit on the Maine Indian Tribal-State Commission and while on the Commission, Mr. Manahan continued to represent clients whose interests were in direct conflict with those of the Maine Tribes. Although this was of great concern to the other Tribal and non-Tribal members of the Commission, Governor King took no action to address this situation.)(The Task Force also recommended that a conflict of interest policy be created for MISC. This recommendation was also disregarded by the State)

× State does not adequately enforce State and federal environmental laws. The Maine Natural Resources Council, in comments recently submitted to EPA, described a "pattern of inadequate enforcement by [Maine] DEP of state and federal environmental laws." Due to the State's inaction, the rivers and water systems that Maine Tribes rely on for food, ceremonies and medicines are contaminated by PCBs, lead, mercury, dioxin and other toxic chemicals.

× If the EPA delegates the NPDES program to the State, Tribes will lose the protections of the federal laws outside the CWA. (E.g. Endangered Species Act and the Historic Preservation Act..)

× Even the US Fish and Wildlife Service, in its comments to EPA, doubts that once EPA delegates the NPDES program to Maine, it can maintain the same level of protection for salmon, and other Tribal resources, currently available to the Tribes under the Endangered Species Act.

× Attempts by the Tribes to negotiate with the State over the NPDES delegation and other environmental issues have floundered because of the State's intractable position that it has

no reason to negotiate with us on any issue addressed by the Settlement Acts. EPA Region I employed the services of a mediator to bring the State and Tribal parties together to discuss the NPDES delegation issue. The State was the only party who declined to participate.

Tribal cultural survival is reciprocally linked to water quality and ecosystem health

× Native laws and customs assign human beings a spiritual duty to maintain the balance and health of the natural world. Encroachment upon this basic right of recognition of our own spiritual laws and customs, including the right to manage and use our resources, means cultural genocide for Maine Indians.

× Traditional Tribal activities are greatly limited because of pollution.

× Due to the current high levels of contamination, we cannot engage freely in our traditional activities including hunting, fresh and salt-water fishing, gathering and cultivation. Poor water quality (pollution) deprives us of our own traditional means of subsistence, medicines and ceremonial plants.

When contamination makes it impossible to hunt, fish or gather food stuffs and medicine in accordance with our traditions, we cannot pick up and go elsewhere. We must stay on and suffer the consequences. Therefore, when our natural resources are adversely impacted or damaged by influences beyond our control, a vital part of the Tribes cultural link is broken. Accordingly, preservation and protection of natural resources is preservation and protection of Tribal health and culture.

If EPA delegates the NPDES program over our homelands to Maine, we will no longer be guaranteed a role in the environmental decisions that may adversely impact the health, safety and welfare of our people. Without the full range of federal Trust supervision and Tribal opportunity to participate in environmental regulation, the State will be free to continue to degrade our environment and consequently rob us of our Tribal culture and traditions.

The State's support of industry practices and proposals and its exclusion of the Tribes from the State's decision-making process, have already threatened and/or endangered the Tribes environment, their health and their cultural traditions. For example: Without ever consulting the Penobscot Indian Tribe, the State approved a plan that closed the last free flowing section of the Penobscot River between the Penobscot Indian Reservation and the Atlantic ocean that also required the removal of migrating Atlantic salmon from reservation waters The project was eventually rejected by FERC. EPA gave this project its lowest environmental rating possible.

In 1997, the Penobscot Indian Nation appealed a NPDES permit issued by EPA to the Lincoln Pulp and Paper Company, which discharges dioxin and other toxic chemicals directly upstream from the Nation. Maine's discharge permit to Lincoln mirrored the NPDES permit. Both permits required the company to monitor the health impacts of its discharges on eagles. (The Tribe had even offered to pay for the Study.) But when the Nation appealed the federal permit, thus suspending the new license conditions until the appeal was resolved, Lincoln asked the State DEP to remove the eagle monitoring requirement.
The DEP, which will issue NPDES permits if EPA approves the delegation, complied with Lincoln's request without providing the Tribe notice of the pending modification request. Under State regulations, the DEP must notify an adjacent landowner prior to the modification of a State permit. However, in this case, even though Lincoln discharges dioxin directly into Tribal waters and those waters directly impact on the Tribes environment and the health of its members, the Maine DEP determined that it was not required to notify the Tribe because it was not an adjacent landowner.

In order to protect our Tribes, EPA should deny the State any authority to regulate, or adversely impact, water quality on our lands.

×

This EPA decision will impact all of Indian Country

× Lack of federal trust responsibility will erode sovereignty for all Tribes and increase environmental justice transgressions on Indian lands and waters. An EPA decision in support of the Maine application would set a dangerous precedent which would impact sovereignty and cause an uproar across Indian Country.

Settlement Act was a compromise and all issues were not resolved

× The Federal government is a partner in the Settlement Act. The Settlement Act was a compromise - all parties gave up something. State did not achieve its goal of depriving Tribes of their sovereignty and jurisdiction. Many areas of disagreement were left to resolve after Acts were passed.

× Richard Cohen, former Maine Attorney General and lead negotiator for the State in 1980, confirmed that not all issues resolved by the Act: "[T]here seems to be a belief that the Indian Land Claims Settlement Act was signed and that its carved in stone. There has to be some disabusing about that" "There were many issues that were subject to discussion and further legislation at that time." Working WaterFront/ Inter-Island News July 1997, Page 3. See also minutes of the Maine Indian Tribal State Commission (MITSC), March 18, 1977 and Fax to Mike Best from Diana Scully, Executive Director of MITSC, March 5, 1997 regarding fishing rights under the Act.

× Congress promised no acculturation of the Maine Tribes:

> Nothing in the Settlement provides for acculturation, nor is it the intent of Congress to disturb the culture or integrity of the Indian people of Maine. To the contrary, the settlement offers protections against this result being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all internal matters. (Sen. Melcher, Report to the Senate Select Committee on Indian Affairs, Authorizing Funds for the Settlement of Indian Claims in the State of Maine, S. 2829), Report Number 95, 95th Cong., 2nd Sess. 17, (September 17, 1980).